BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANCES R. DAVENPORT	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,034,647
	)	1,043,900
MARCON OF KANSAS	)	
Respondent	)	
AND	)	
	)	
WESTERN AGRICULTURAL INSURANCE CO	)	
BANKERS STANDARD INSURANCE CO.	)	
Insurance Carriers	)	

ORDER

Respondent and its carrier Western Agricultural Insurance requested review of the December 30, 2013, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on April 15, 2014.

APPEARANCES

Paul D. Post, of Topeka, Kansas, appeared for the claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for respondent and its carrier Western Agricultural Insurance (Western). Jodi Fox, of Kansas City, Kansas, appeared for respondent and its carrier Bankers Standard Insurance (Bankers).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At the oral argument to the Board, the parties stipulated that the Award utilized inaccurate task loss percentages in calculating the resulting permanent partial general (work) disability. The ALJ calculated claimant's loss of 5 tasks lost out of a possible 17 as 2.9 percent rather than the correct 29 percent. Likewise, a 13 percent task loss opinion was listed as 1.3 percent and the resulting average was listed at 2.1 percent rather than the correct 21 percent. The incorrect numbers were then utilized by the ALJ in the work

disability calculation. Corrected task loss percentages, if deemed appropriate, will be used by the Board at the time of the calculation of the final award in this matter. The parties were also unable to explain the ALJ's use of a $96.50 weekly benefit amount when calculating the final weeks of work disability. A correct weekly benefit amount, based upon the stipulated average weekly wages for claimant's dates of accident, will be utilized by the Board at the time of the final calculation of this award, if appropriate.

ISSUES

In Docket No. 1,034,647, the ALJ was asked to consider claimant's request for Review and Modification of a previous award. In Docket No. 1,043,900, claimant argued she suffered a new and distinct accident and resulting injuries with an injury date of September 22, 2008. The ALJ determined the primary issue was whether claimant had a new injury resulting in increased permanent impairment or an aggravation of her previous low back condition that was a natural and probable consequence of her June 10, 2005 injury, resulting in increased permanent impairment justifying a modification of claimant's original award.

The ALJ found claimant did not suffer a new and distinct work-related accident in 2008. Instead, claimant's increased symptoms were found to be the natural and probable consequence of the 2005 accidental injury. The ALJ awarded claimant an increased functional impairment of 5 percent to the body as a whole and a 33.2 percent permanent partial general disability, thereby modifying the award entered on July 14, 2008, in Docket No. 1,034,647.

Claimant was awarded $500 in unauthorized medical to be paid to claimant's counsel. The 2008 visits to Dr. Hodgson and the $1,676 medical bill incurred due to an MRI ordered by Dr. Hodgson were found to be unauthorized medical treatment. Claimant's prescription for Tramadol and the visits to Dr. Hodgson to continue that prescription were considered authorized medical expenses from the entry of the modified award. Future medical treatment was ordered to be considered upon proper application.

In Docket No. 1,043,900, the ALJ denied compensation for an accidental injury alleged on September 22, 2008.

The ALJ determined claimant's attorney is not entitled to attorney fees at this time. The ALJ held it was not clear from the motion filed, even with attached documents, as to the amount of hours and expenses incurred in prosecuting the review and modification application.

Western appeals, arguing claimant's condition changed due to a new and distinct accidental injury (or injuries) that resulted in an aggravation of claimant's preexisting

lumbar condition. Western argues the record does not support finding that claimant's increased impairment is related to the 2005 accident and resulting injuries. Finally, Western argues claimant failed to establish that the need for the future medical benefits awarded are reasonable and necessary to cure or relieve the effects of the June 10, 2005, accidental injury.

Claimant did not file an appeal in this matter and argues the ALJ's Order should be affirmed.

Bankers argues the Board is without jurisdiction to consider Docket No. 1,043,900, as no appeal was taken from that decision. Bankers maintains these matters were never consolidated, the hearing transcripts were created separately, several depositions were taken separately and the Award creates separate rulings for the two docketed cases.

Bankers further argues claimant failed to prove her current condition is the result of a new and separate injury or aggravation that she sustained on September 22, 2008. Respondent and Bankers contend claimant's complaints of pain never resolved following her 2005 injury. Therefore, her current symptoms are the natural and probable consequence of her original June 10, 2005, injury. Respondent and Bankers also argue claimant failed to prove she suffered any wage loss following the September 22, 2008, accident and any task loss is likely the result of the June 10, 2005, accident.

The issues on appeal are:

1. Does the Board have jurisdiction to review Docket No. 1,043,900, where it is alleged no Notice of Appeal was filed within 10 days, pursuant to K.S.A. 44-551(i)(1)?

2. What is the nature and extent of claimant's disability?

i. Has claimant's functional impairment and/or work disability increased as the result of the injuries sustained from the accident of June 10, 2005?

ii. Did claimant suffer an intervening accident or repetitive trauma subsequent to the June 10, 2005, accident?

iii. Did the ALJ exceed her authority by relying on medical opinions which are not part of the record for determining an increase of impairment?

3. Is claimant entitled to future and unauthorized medical compensation?

i. Did the ALJ exceed her authority by awarding future and past medical benefits as authorized?

4. Are the stipulations between the parties in the subsequent claim binding on the parties in connection with the Review and Modification proceeding?

5. Did the ALJ err when she denied compensation as a result of an accidental injury alleged to have occurred on September 22, 2008?

FINDINGS OF FACT

At the time of the original April 10, 2008, regular hearing in this matter, claimant had been working for respondent for 10 years. Claimant's job was making and baking pies to be sold in restaurants and grocery stores. Respondent had 12-15 other employees making pies as well. The employees baked four days a week, with Fridays spent cleaning ovens. Claimant testified that on a normal day 500 to 600 pies were made.

On June 10, 2005, while cleaning ovens, claimant was in a seated position in front of an oven, replacing rails, when she felt a sharp pain in her low back that ran down her legs. This sharp pain made it difficult for her to move, but she managed to make her way to the restroom. Due to a significant amount of pain, claimant was unable to leave the restroom. She hollered for help and her husband, who also works for respondent, and her boss came and helped her to her vehicle, giving her ice for her back. After several hours of radiating pain, claimant was able to move around.

On Monday, June 13, 2005, claimant went to see David Hodgson, M.D., her primary care physician. She testified that the pain would increase if she was not careful with her activity. She also could not sit for too long, and would stretch out flat on her bed or the floor when her low back pain was bad. Physical therapy helped alleviate some of the pain.

Claimant was provided with job modifications after the June 10, 2005, accident. She was assigned an assistant to do most of the carrying and bending. She continued to bend, but the modifications seemed to help a little. At the time of the 2008 regular hearing, claimant continued to work the same number of hours at the same rate of pay. She worked some overtime depending on how much there was to do and if she had help. She sometimes worked 10-12 hours a day. Claimant testified that staying mobile helped her physically. Her supervisor wanted her to take on more of a supervisory role and do less physical work, but she was not able to do that due to fluctuations in the workforce of the company. Claimant did not miss any work because of the June 10, 2005, accident.

At the request of respondent and Western, claimant initially met with William T. Jones, M.D., an orthopedic physician, on September 13, 2005, for evaluation of pain in her back and left lower extremity. Dr. Jones sent claimant for physical therapy, prescribed pain medication and ordered x-rays and an MRI. Dr. Jones opined claimant had aggravated preexisting degenerative disk disease, osteoarthritis and degenerative spinal stenosis of the lumbar spine. He recommended anti-inflammatory medication and to apply moist heat.

Claimant was to minimize flexion and twisting motions of the spine. Claimant reported no history of back pain. Dr. Jones indicated however, on cross-examination, that claimant had some underlying degenerative disk disease in her back, which was aggravated by the incident at work in June 2005. He recommended claimant work no more than 10 hours a day.

In March 2006, Dr. Jones recommended physical therapy. On July 11, 2006, Dr. Jones recommended a CT myelogram. On August 22, 2006, claimant was referred for pain management with Steven Peloquin, M.D., who provided claimant with multiple epidural steroid injections. Because claimant received no long-lasting relief from the injections, Dr. Jones determined claimant had more than just inflammatory pain.

Dr. Jones did not meet with claimant again until February 20, 2007, at which time he found her to be at maximum medical improvement. He suggested claimant continue working with restrictions, or move into a different job that required less bending, twisting and lifting. If those options were not available he recommended claimant discontinue working altogether.

Dr. Jones, in a letter dated March 5, 2007, and addressed "To Whom It May Concern",[1] opined claimant sustained an aggravation of preexisting degenerative disk disease, osteoarthritis and degenerative spinal stenosis of the lumbosacral spine as a result of a work-related injury. Dr. Jones noted claimant continued to work full-time despite almost daily pain, particularly with repetitive bending, twisting, and lifting. He opined the repetitive nature of claimant's movements in her job perpetuated her symptoms. Dr. Jones felt claimant had three options: terminate work altogether; continue working in her current capacity while enduring the pain; and finally be reassigned within the company to a job that requires less bending, lifting and twisting. It was Dr. Jones' impression that claimant had almost reached her limit with respect to the endurance of daily pain. He felt it important to keep claimant in the workforce, preferably in another position within the company, which would limit her to occasional bending, lifting and twisting. He indicated claimant's pain and symptoms would likely increase if she continued to bend at the waist during her employment.

On March 26, 2007, Dr. Jones, in a letter to Cindy Carley, a Farm Bureau Claims Supervisor,[2] stated it was his impression that claimant sustained a work-related aggravation of a preexisting problem with respect to her lumbosacral spine and that she was at maximum medical improvement, as of March 5, 2007. He went on to assign an 8

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[1] Jones Depo., Ex. 1.

[2] *Id.*, Ex. 2.

percent whole person functional impairment, under the Spinal Injury Model of the *Guides*.[3] Dr. Jones opined that this 8 percent preexisted the June 10, 2005, date of accident.

Dr. Jones testified he did not use the range of motion model because he did not feel it was very accurate. He acknowledged that if he had used the DRE method, claimant would have had a 5 percent impairment under DRE Lumbosacral Category II. However, if claimant had been found to have non-verifiable radiculopathy, she would have been entitled to a 10 percent impairment. Finally, Dr. Jones testified if claimant were to require surgery at some point, it would be a decompressive procedure at three levels.

Claimant met with board certified disability evaluating physician, Peter V. Bieri, M.D., for an evaluation on August 23, 2007, at the request of her attorney. Claimant presented with complaints of low back pain radiating into her left lower extremity from an injury which occurred in the course of her employment on June 10, 2005. Dr. Bieri noted an August 19, 2005, MRI showed results consistent with marked stenosis at L4-5 and L5-S1 and lesser findings at L3-4. Claimant also had a nerve conduction study on October 27, 2005, that was essentially normal. A CT myelogram on July 24, 2006, was consistent with the MRI findings. Dr. Bieri noted claimant continued to work with no formal restrictions and within her pain tolerance.

Dr. Bieri opined claimant suffered from lumbar strain and clinical left lower extremity radiculopathy from the work-related injury which incurred on June 10, 2005. Dr. Bieri found claimant had experienced a loss of range of motion, which he attributed to the June 10, 2005, accident. He couldn't say if claimant's continued working would further affect her range of motion. He did not find any atrophy, weakness or sensory loss. Claimant did have a subjective decrease in sensation along the lateral aspect of the entire left lower extremity, to the toes, and a slight decrease in reflexes on the right. He found claimant to be at maximum medical improvement and assigned a 10 percent whole person impairment. This rating was based on DRE Lumbosacral Category III of the *Guides*.

Because claimant has continued under active care in the form of prescription and over-the-counter medication, Dr. Bieri did not anticipate claimant would need future specific treatment, but she may eventually be a surgical candidate.

Claimant suffered another accident on September 17, 2007, when she bent over wrong and had sharp pain in her back and couldn't move. She used a combination of ice and heat and was able to move around well enough to return to work the next day. Claimant did not seek any medical attention for this accident because she thought the

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

symptoms could be controlled with heat and ice. She did report the accident to her supervisor.

Claimant alleged a new injury on September 22, 2008, while in the course of her employment with respondent. She claimed the bending, lifting and other activities caused additional injury to her low back. Claimant had two sets of ovens, high and low, that she baked with. She was placing pies in the lower oven when she experienced an onset of low back pain. Claimant was examined by Dr. Hodgson on September 22, 2008, complaining of additional back pain with pain, weakness and burning into her left leg.

Claimant explained the accident happened because she was not careful enough and she moved or lifted or twisted wrong.[4] The more bending and reaching she did, the more she hurt. She testified she leaned against walls and tables to keep her back straightened and for safety and support. Claimant couldn't recall when she started using walls and tables to keep from falling, although, it was sometime after the September 22, 2008, accident.[5] She didn't realize how much she was doing it until her coworkers started asking if she was feeling bad and did she need to sit down.

Claimant met with physical medicine and rehabilitation specialist, Terrence Pratt, M.D., for a court-ordered independent medical examination (IME) on September 10, 2009. Claimant presented with a chief complaint of low back pain. She reported initial symptoms in 2005, while cleaning ovens. In 2008, claimant turned wrong in the course of her employment and her symptoms increased. Dr. Pratt wrote that claimant reported her current symptoms were dependent on ambulation, working and bending. Claimant reported pins and needles sensations in her left lower extremity generalized and in the right lower extremity from the knee to the foot. Her symptoms are exacerbated when she rolls over, with her left leg feeling like it is on fire, and with prolonged sitting over thirty minutes.

Dr. Pratt wrote claimant had some improvement in her 2005 symptoms from injections she received, but the symptoms slowly returned. Claimant reported that her lower extremity symptoms developed in 2008, and in general her symptoms increased since the most recent event, but not significantly. Claimant's pain diagram had her pain at a 4 to 9 out of 10. She indicated deep aching in the central low back with pins and needles sensation involving the right leg and foot, deep aching and stabbing in the left thigh with pins and needles sensation with burning in the left leg and pins and needles sensation in the left foot. Claimant continues driving, can perform activities of daily living and performs her full-time work duties.

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[4] R.H. Trans. (Sept. 5, 2013) at 14.

[5] *Id.* at 18.

Dr. Pratt diagnosed chronic low back pain with multilevel degenerative disc disease and spinal stenosis. He noted claimant has had persistent symptoms since 2005 with specific documentation of symptoms in 2006 with therapeutic intervention, documentation of chronic involvement of her lumbosacral region by her primary care physician in 2007 and reported bilateral lower extremity symptoms before the 2008 slight aggravation of her symptoms. He felt claimant's symptoms are the probable consequence of her work-related injury on June 10, 2005, with multilevel degenerative changes and spinal stenosis preexisting September 22, 2008, and June 10, 2005. No medical records show claimant ever had any low back complaints of a serious nature prior to June 10, 2005.

Dr. Pratt acknowledged the EMG studies from October 27, 2005, reflected a normal study, with claimant displaying normal reflexes without atrophy on June 10, 2005. Additionally, claimant displayed no right leg complaints in 2005. At the April 10, 2008, hearing, claimant failed to express complaints of weakness in her legs. Dr. Pratt agreed the September 22, 2008, report from Dr. Hodgson indicated weakness in both claimant's legs.

Dr. Pratt opined claimant had preexisting degenerative changes that were present prior to the 2005 and 2008 events, and basically she had an aggravation of the underlying involvement. He testified that the aggravation occurred in 2005 and was reported as vocationally related. Claimant continued to have symptoms after that and developed more symptoms before the September 2008 accident.

Dr. Pratt indicated claimant's aggravation was not the result of a single traumatic accident, but rather a continuous and repetitive trauma from work activities performed since March 5, 2007, when claimant was released at maximum medical improvement. His understanding was claimant had aggravations prior to and after September 22, 2008. Dr. Pratt indicated that the accident in 2008 led to an increase of claimant's symptoms. He also indicated there can be an increase in degenerative disease with a sedentary lifestyle as well as with an active lifestyle, but someone doing heavy activities is more likely to have more problems.

Claimant was asked to consider additional injections and a surgical reevaluation should the injections fail. Dr. Pratt felt claimant should temporarily avoid frequent low back bending and twisting. Although Dr. Pratt was not asked to address permanency, he testified that he had no reason to disagree with Dr. Bieri's opinion of a 10 percent impairment to the body as a whole. He also felt that claimant's impairment had increased. But, he had no opinion as to the amount of the increase in impairment. He testified that the event in 2008 was the least significant in terms of claimant's increased symptoms.

Claimant met with Dr. Bieri for an additional evaluation on February 15, 2010, at the request of her attorney. Dr. Bieri issued another report in regard to claimant's work-related injury. He wrote claimant's symptoms were worse, primarily with increased pain in the low

back with radiating pain into both lower extremities. He noted she had increased difficulty with any lifting, bending or twisting, as well as with sitting and driving. Dr. Bieri's examination revealed moderate low back pain and tenderness to palpation, radiating into both hips. Dr. Bieri noted that in 2007 claimant only complained of pain in the left lower extremity and left hip. He noted finding a decrease in range of motion of the lower extremities in 2010, and sensory deficits in both lower extremities in 2010, whereas, in 2007, there was only a slight decrease in the left.

Dr. Bieri noted claimant reported additional injury during active employment possibly in September 2007 and September 2008, thus aggravating the preexisting condition of claimant's lumbar spine region from 2005. He continued to believe pain management was an appropriate treatment option for claimant and believed the need for more formal pain management was the direct result of the second injury. He utilized the Range of Motion model in the *Guides*, and determined claimant had an additional 5 percent whole person impairment attributable to the most recent injury.

Dr. Bieri opined claimant was symptomatic from the time of the previous injury on the occasion of his August 23, 2007, evaluation. He couldn't say when the increase in pain started. His rating was based primarily on the difference between the range of motion recorded at the time of the first evaluation and the range of motion at the time of the latest evaluation. Claimant was symptomatic in the same area and had increased symptoms.

Claimant's official duties continued to be making pies, working the ovens and overseeing any work that needed to be done. In March 2011, claimant reduced her work to 20 hours per week because of back pain going down into her left leg. Claimant testified she had pain going down into her left leg in 2005. Claimant testified that she had been doing real good and wasn't having too many problems until she reinjured her back. Claimant testified that her pain level depends on the day and what she does that day. As of the hearings on September 5, 2013, claimant was only working 15 hours a week. Claimant meets with Dr. Hodgson three times a year for medication management. Claimant has been receiving Social Security disability since March 2011 and Medicare since August 1, 2013.

Claimant met with Dick Santner on June 9, 2011, for a vocational assessment, at the request of her attorney. Mr. Santner noted claimant injured her low back and received treatment, most of which was not very helpful long term. He did not have access to any of claimant's medical records at the time of this visit, so he was unsure of any specific work-related restrictions that may have been placed on claimant. Mr. Santner testified that this information was not necessary for him to undertake his evaluation.

Mr. Santner identified 17 tasks claimant has performed over the last 15 years, and determined as she has continued to work for respondent part-time she is earning $9.65 per hour for 15-18 hours a week. He indicated claimant has help with the heavier work

activities. He testified that you have to be a much more accomplished baker to work for respondent than to work at Daylight Donuts. He also noted claimant had been approved for Social Security disability insurance. All of his opinions are based on the June 10, 2005, accident.

Dr. Steven Reintjes, M.D., first met with claimant on February 22, 2012, for an examination related to claimant's recurrent low back pain. Claimant complained of low back pain with numbness since 2008. She described her pain as a progressive, shooting pain that runs from her buttocks to her feet, with a burning sensation that radiates down the left lateral thigh and calf. Claimant also complained of tingling in both legs and of poor balance. Dr. Reintjes noted claimant reported dragging her left leg when she walks. He did not see claimant dragging her left leg when she walked during his examination.

Dr. Reintjes performed a physical exam and noted decreased pinprick sensation in the left L5 distribution; normal bilateral lower extremity strength and normal reflexes. He also found claimant to have a normal gait and movement of her legs.

Dr. Reintjes' impression of claimant's condition was lumbar spine stenosis at L3-4 and L4-5, with a history of low back pain and exacerbation over the past three years. He felt claimant's work was the primary cause for the low back and lower extremity pain. He was unable to correlate claimant's historical complaints, her physical exam findings, and her radiographic findings into a diagnosis consistent with radiculopathy. He was also unable to correlate claimant's x-rays and her physical findings to establish a diagnosis of radiculopathy.

Dr. Reintjes reviewed claimant's January 27, 2012, MRI which showed moderate stenosis at L4-5 and mild stenosis at L3-4 with some degenerative disc changes at L5-S1. He did not find this abnormal considering claimant's age. He indicated there was nothing on radiograph he deemed to have been caused by either of claimant's occupational events. Dr. Reintjes went on to recommend claimant have a lumbar myelogram with CT scan.

Claimant returned to Dr. Reintjes on March 23, 2012. The lumbar myelogram with CT scan showed mild ligamental thickening at L4-5 and some very advanced degenerative disc changes at L5-S1. There was no significant disc herniation or significant lumbar spinal stenosis at any level. Dr. Reintjes opined that the ligamental thickening was caused by aging. He went on to testify there are three common causes for degenerative changes like he saw in claimant, and they are: smoking, manual labor, and trauma.

Dr. Reintjes recommended claimant return to work, but should limit her bending, twisting, and heavy lifting. He specifically recommended claimant limit her lifting to 35 pounds. He also limited claimant's sitting, standing and walking to two hours at a time and up to 10 hours per day. Depending on the demands of her work, claimant's break between

these two-hour periods could range anywhere from 5 to 15 minutes.

In a letter dated October 21, 2013, Dr. Reintjes opined that as of March 23, 2013, claimant was at maximum medical improvement, with a 5 percent whole body permanent partial disability. Dr. Reintjes testified that this 5 percent impairment is attributed to a combination of the 2005 and 2008 injuries. He also had the opportunity to review the task list of Bud Langston and opined claimant should be able to perform the identified tasks. However, Dr Reintjes acknowledged on cross-examination that claimant's lifting should be limited to nothing over 35 pounds. Any job tasks exceeding that lifting limit would be beyond claimant's ability. This lifting restriction violated two of Mr. Langston's tasks resulting in a task loss of 13 percent.

In a letter from claimant's attorney, dated April 2, 2013, Dr. Bieri was asked to review the revised task list of Dick Santner to determine claimant's task loss. Dr. Bieri opined claimant has a 29 percent task loss having lost the ability to perform 5 out of 17 tasks.

Dr. Bieri testified he did not assign restrictions in 2007 or 2010 and instead utilized the documentation from Dr. Pratt as far as restrictions and how those relate to the tasks. The restrictions he used to formulate his task loss opinion are those attributable to the injuries after 2007. He did not assign any of his own restrictions as he was not specifically asked to do so. He testified that had he been asked to assign restrictions, he would have placed claimant in the medium physical demand level, which would limit occasional lifting to 50 pounds, frequent lifting not to exceed 20 pounds and no more than 10 pounds of constant lifting. Those restrictions take into consideration claimant's low back impairment.

Dr. Bieri indicated that if there were tasks claimant would avoid because she was self-limiting due to symptoms, then those are tasks that she should be restricted from performing. However, he also indicated that a simple complaint of pain doesn't preclude certain activity. But, additional injury consistent with increased pain would suggest that certain activity should not be performed.

A Review and Modification hearing was held on September 5, 2013, in relation to the award entered on July 14, 2008, for Docket No. 1,034,647. The Award was for a 9 percent whole body impairment to the lumbar spine. Claimant was asking for modification of that award due to an increase in symptoms related to the September 22, 2008, accident. The direct examination testimony of claimant contained in the Regular Hearing transcript in Docket No. 1,043,900, taken earlier the same day, was incorporated into the Review and Modification record. However, the cross-examinations in each docketed transcript relate to that docketed injury claim. Even though the Review and Modification hearing was listed in Docket No. 1,034,647, counsel for Bankers (Docket No. 1,043,900) was present and participated in portions of the hearing.

Claimant testified her boss had tried to transition her into a supervisory role, but she did not see herself as a supervisor. She had to cut down on the amount of work she was doing and no longer worked overtime. She worked three days a week with Wednesdays off. She originally had an assistant to help her on Wednesdays since 2005.

Claimant testified that her back condition has slowed her down because she has to be more careful. She doesn't want to get hurt again and make her condition worse. She is able to bend down, but has to have something to help her stand. She no longer lifts or carries anything heavy. She testified if she sits just right, the pain in her low back will shoot down her left leg and require she change position.

Claimant testified that in 2008 she began to notice numbness and tingling in her right leg from her toes to her knee. Claimant also admitted to another incident in April 2009, ten days before she was deposed.

Claimant was asking for reimbursement of medical bills she paid to avoid having them affect her credit standing. Claimant has been receiving pain medication, Tramadol, from Dr. Hodgson. Claimant gets a 30-day supply and tries to take no more than two pills a day. She also takes two Tylenol PM when she goes to bed as it helps her with the pain so she can sleep. She testified there have been a few times where she has taken up to six pills in a day for the pain, but that is rare.

Claimant met with Bud Langston on September 11, 2013, via telephone, for a vocational assessment. This assessment related to claimant's alleged September 22, 2008, injury to her low back. Claimant reported twisting while performing a task and causing injury to her back. Claimant reported being able to perform most activities of daily living. Mr. Langston went through claimant's work history for the 15 years preceding the September 22, 2008, injury and found claimant has had 3 jobs.

Mr. Langston identified 15 tasks that claimant performed over the 15 years preceding her September 22, 2008, injury. Mr. Langston was not aware that Dr. Jones told claimant she should quit working at her job at MarCon. He testified that this would have been important to know if her work injury was directly related to her work. He wondered why she would continue in the job after she had been advised not to.

Mr. Langston testified claimant told him about the helper she has had since her 2005 injury, and that she is working 15-18 hours a week at $9.65 an hour. Claimant had been accommodated very well by respondent.

PRINCIPLES OF LAW AND ANALYSIS

Bankers argues the lack of a formal appeal in one of the two docketed cases limits the Board's jurisdiction to the appealed case only. Arguments similar, if not identical, were

rejected in *Burnett,*[6] *Magana*[7]*, McMurtry*[8] and, as cited by claimant, *McDiffett.*[9]

In *Burnett,* the Board stated:

> In one award the ALJ decided claimant's request for benefits for foot injuries presented in Docket Nos. 220,246 and 223,942. Respondent, Fiberglass Engineering, Inc. and its insurance carrier agree that both cases were informally litigated together but there was never an order consolidating the cases. Although claimant listed both docket numbers in his application for review, Fiberglass Engineering, Inc. argues that the issue raised by claimant only applies to the award entered against respondent Wal-Mart. Consequently, Fiberglass argues there was no request for review of the findings in the claim against it.
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> It is significant in this instance that, while no specific order was entered by the ALJ consolidating the two docketed claims, nonetheless, the parties treated both cases as consolidated with the initial preliminary hearing, the regular hearing and deposition testimony of Drs. Tony J. Fornelli, Edward J. Prostic and Michael J. Poppa being taken at the same time in both cases. And the evidentiary deposition of Patsy Adams Ramey was also taken at the same time. At the regular hearing, the ALJ took stipulations for both cases and then established terminal dates as though these matters were consolidated. Moreover, respondent Fiberglass Engineering, Inc. never objected to consolidated trial of the two claims.
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> There are no designated rules concerning consolidation of workers compensation claims and how such is to come about in workers compensation proceedings. Review of both civil and criminal statutes outside the Workers Compensation Act provide little guidance as they only provide specific internal rules to follow when consolidation is considered appropriate. Those statutorily designated procedures would not apply to a workers compensation situation unless specifically noted in the Workers Compensation Act. It is noted, however, that the consolidation of workers compensation matters has become a common practice and at times best serves justice and judicial economy in workers compensation litigation. For the parties to be forced to spend the time and money involved in taking multiple depositions when consolidated depositions are appropriate would seem a waste of

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[6] *Burnett* v. *Fiberglass Engineering, Inc.,* & *Wal-Mart,* Nos. 220,246 & 223,942, 2003 WL 22401236 (Kan. WCAB Sep. 30, 2003).

[7] *Magana v. IBP, Inc.,* Nos. 236,071, 241,633 & 256,300, 2004 WL 1058376 (Kan. WCAB Apr. 22, 2004).

[8] *McMurtry v. OK Transfer* & *Storage, Inc.,* Nos. 1,025,690 & 1,042,145 (Kan. WCAB Sept. 13, 2011).

[9] *McDiffett, Jr., v. Food Services of America,* Nos. 177,095 & 177,096,1996 WL 754290 (Kan. WCAB Dec. 31, 1996); see also *Zuercher v. Wheat State Manor* & *Newton Medical Center,* Nos. 186,892, 233,958, 1999 WL 55358 (Kan. WCAB Jan. 21, 1999).

time, cost, and effort.

In the instant case, the ALJ left the impression of a consolidation of these matters by allowing one regular hearing to suffice and by allowing the deposition testimony of the doctors and witnesses to be taken in both cases together, with all parties represented. The Board also notes the order setting terminal dates by the ALJ was a consolidated order involving all parties. Therefore, the Board finds that these matters were consolidated for the purpose of regular hearing and the claimant's request for review applies to both Docket Nos. 220,246 and 223,942.

As a matter of fairness, the Board has consistently adhered to its policy holding that all docketed cases which have been consolidated are subject to Board review although only one docket number may have been listed in the application for review. The claims have been tried, argued, and decided as consolidated and remain consolidated for purposes of Board review. To hold otherwise is to lay traps for the unwary. Moreover, because review by the Board is de novo, any issues raised before the ALJ may be considered on review by the Board.

In *Magana,* the Board stated:

The Board has held on numerous occasions that when multiple docketed claims have been combined or consolidated by an administrative law judge for purposes of litigation and award, all of the claims are subject to Board review when any of the combined claims are appealed.

It must be emphasized the Workers Compensation Act does not address combining and consolidating claims for litigation and award purposes. Likewise, no administrative regulations have been promulgated to address that subject. But it has been a long-standing practice of the administrative law judges to combine or consolidate claims when it appears the parties would benefit from such action or that the claims are so intertwined that combining or consolidating them would result in judicial efficiency.

Although Judge Avery entered a formal order consolidating the claims in Docket No. 236,071 and Docket No. 241,633, it cannot be argued that all three claims were not combined for hearing, taking evidence and for disposition. And, in fact, Judge Avery decided all three claims in one document.

Had Judge Avery entered a formal order consolidating all three claims, there would be no question that this Board has the jurisdiction to review all of the issues raised in these claims. In *Solis,*[10] the Kansas Supreme Court found that an assistant director had consolidated two claims for hearing and held all the issues in both claims were subject to review despite an application being filed to review the

[10] *Solis v. Brookover Ranch Feedyard, Inc.*, 268 Kan. 750, 999 P.2d 921 (2000).

findings in only one of the two docketed claims. The Court stated, in part:

> Although only Hartford petitioned the Board for review, K.S.A. 44-551(b)(1) does not limit the Board's scope of review to issues raised in the written request for review. Rather, once a party files a written request for review of the administrative law judge's decision, the Board has the authority to address every issue decided by the administrative law judge. Because the two cases were never severed, the Board had jurisdiction to address any of the issues raised in the consolidated cases, and KLA was a proper party.
>
> Further, it is clear that in addition to being consolidated, Docket No. 190,678 and No. 220,773 were inextricably intertwined. The damage to the glove and the duty to make repairs were either the responsibility of Hartford or KLA. The Assistant Director's finding in Docket No. 190,678, that Hartford was liable for repairs, necessarily led to the finding in Docket No. 220,773 that KLA was not liable. Were the Board to find that the Assistant Director had erred in holding Hartford liable, the Board would also necessarily have found that the Assistant Director had erred in absolving KLA of liability. Thus, Hartford's argument that KLA was not a proper party and had no stake in the proceedings is without merit.[11]

Interestingly, the Kansas Supreme Court's *Solis* decision does not indicate whether the assistant director entered a formal order consolidating the cases or whether the Supreme Court concluded the cases were consolidated for hearing as they were heard together.

In the three claims at hand, claimant alleged injuries from a combination of single accidents and a series of repetitive traumas to both upper extremities, both shoulders and the area of the upper back and neck for each working day through his last day of employment with respondent. Moreover, claimant also alleged the initial injury and symptoms of the right upper extremity caused him to overuse and injure the left upper extremity. And the Judge, after considering all the evidence, determined claimant sustained a series of repetitive traumas through his last day of work and determined the appropriate date of accident for the third claim was January 22, 2001, which was claimant's last day of work for respondent.

The Board concludes all three claims were combined and consolidated by the Judge despite the absence of a formal order addressing the three claims. The Board also concludes the claims were inextricably intertwined and, therefore, all three should be addressed in this appeal.

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[11] *Id.* at 753-754 (citations omitted).

The Kansas Court of Appeals affirmed the Board's ruling in *Magana.*[12]

The Board issued a similar ruling in *McMurtry,* in which only one of two docketed cases was appealed and one of two insurance carriers representing the same respondent submitted the Board lacked jurisdiction to hear the docket number that was not appealed. The Board stated:

> In *Solis,*[13] the claimant sought the cost of repairing a prosthesis which was provided by the employer as a result of a work-related injury. At the time of the accident Hartford was the insurance carrier. Hartford alleged the prosthesis was damaged as a result of subsequent work-related mini-traumas and that Brookover's new insurance carrier, Kansas Livestock Association (KLA), should be liable. The claimant filed a second claim against Brookover and KLA. The Assistant Director determined Hartford was liable. Hartford appealed, but the claimant and KLA did not. Hartford argued KLA was not a party to the appeal. The Board concluded KLA was a party to the appeal despite the fact it had never filed for review. The Kansas Supreme Court agreed. The Court stated:
>
> > This argument is without merit. It is undisputed that Docket No. 190,678 and No. 220,773 were consolidated. Although only Hartford petitioned the Board for review, K.S.A 44-551(b)(1) does not limit the Board's scope of review to issues raised in the written request for review. Rather, once a party files a written request for review of the administrative law judge's decision, the Board has the authority to address every issue decided by the administrative law judge. *Woodward v. Beech Aircraft Corp.,* 24 Kan. App. 2d 510, 516,949 P.2d 1149 (1997). See *Helms v. Tallie Freightways, Inc.,* 20 Kan. App. 2d 548, 553, 889 P.2d 1151 (1995). Because the two cases were never severed, the Board had jurisdiction to address any of the issues raised in the consolidated cases, and KLA was a proper party.
> >
> > Further, it is clear that in addition to being consolidated, Docket No. 190,678 and No. 220,773 were inextricably intertwined. The damage to the glove and the duty to make repairs were either the responsibility of Hartford or KLA. The Assistant Director's finding in Docket No. 190,678, that Hartford was liable for repairs, necessarily led to the finding in Docket No. 220,773 that KLA was not liable. Were the Board to find that the Assistant Director had erred in holding Hartford liable, the Board would also necessarily

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[12] *Magana v. IBP, Inc.,* No. 92,323, 2005 WL 824073 (Kansas Court of Appeals unpublished opinion filed Apr. 8, 2005).

[13] *Solis v. Brookover Ranch Feedyard, Inc.*, 268 Kan. 750, 999 P.2d 921 (2000).

> have found that the Assistant Director had erred in absolving KLA of liability. Thus, Hartford's argument that KLA was not a proper party and had no stake in the proceedings is without merit.[14]

> In *Magana,*[15] two claims were formally consolidated for trial and award, but the record did not disclose that the ALJ ruled on the claimant's motion to consolidate a third claim with the others. The ALJ made separate findings and entered separate awards for each claim. The Board found all three claims were combined and consolidated by the ALJ despite the absence of a formal order addressing the three claims. The Kansas Court of Appeals found this was a correct finding by the Board and that the Board had jurisdiction to consider the issues raised in all three claims.

The Board has jurisdiction over claims that are "inextricably intertwined."[16] The two docketed cases involving claimant, Ms. Davenport, are inextricably intertwined.

The claimant's attorney filed a motion on June 19, 2009, for a neutral independent medical examination in both cases, which the judge granted in both cases in the same order.

The ALJ issued an order consolidating the cases for pretrial procedures on September 30, 2009. Claimant sent a joint notice regarding a prehearing settlement conference to both defense counsel. A July 6, 2010, prehearing settlement conference stipulation sheet states the cases are consolidated.

Claimant noticed up all parties for a prehearing settlement conference in one document received by the Division on February 22, 2013, and for both the Regular Hearing and the Review and Modification Hearing in a document received by the Division on May 10, 2013, and amended notices received on August 21 and 23, 2013.

All parties were present for the September 5, 2013, Review and Modification Hearing in Docket No.1,034,467. Counsel for Bankers even participated by stating "no objection" to one exhibit and later trying to lodge an objection.

All parties were present for the September 5, 2013, Regular Hearing in Docket No. 1,043,900. All counsel participated in setting terminal dates for both cases, as noted at pages 40-41 of the Regular Hearing transcript. Judge Sanders' September 5, 2013, order

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[14] *Id.*, at 753-754.

[15] *Magana v. IBP, Inc.,* No. 92,323, 2005 WL 824073 (Kansas Court of Appeals unpublished opinion filed Apr. 8, 2005).

[16] *Solis*, 268 Kan. 754; see *Magana*, 2005 WL 824073 at 4.

of terminal dates listed both docketed cases and was sent to all parties. The judge sent an October 4, 2013, letter to all parties regarding the evidence received in the cases to date and terminal dates regarding both docketed cases. Bankers' motion for an extension of terminal dates, received by the Division on November 11, 2013, lists both docketed cases, as does an agreed order regarding the same.

All parties participated in the 2010 and 2013 depositions of Dr. Bieri, the deposition of Dr. Pratt, and the deposition of Mr. Santner, the transcripts of which reflected both docketed cases. All parties were provided notice of Dr. Reintjes' deposition and Mr. Langston's deposition, but counsel for Western simply did not appear. It appears that all, or nearly all of the depositions that occurred after the 2008 accident were fair game for all parties' participation. As such, Bankers' statement that, "Bankers set and conducted depositions in its case without the participation of anyone from Western and the same was true for the deposition conducted on behalf of Western"[17] is not well received. The depositions Bankers did not participate in (Dr. Jones' deposition and Dr. Bieri's 2008 deposition) occurred before the second accident was alleged.

Submission briefs filed with Judge Sanders by all parties discussed facts and argued issues pertinent to both cases. It is obvious from the briefs, as well as other correspondence sent to the judge, that both insurance carriers were "pointing the finger" at the other carrier.

Judge Sanders considered the docketed cases in one award, with a joint record and joint findings of fact. She also focused on the key issue in both cases: whether claimant's current condition is due to the 2005 injury or a 2008 injury?

These cases were tried together. Despite no formal consolidation order, the cases were *de facto* consolidated. As noted above, formal consolidation is not needed when the cases are inextricably intertwined. Moreover, even if there was such a rule of consolidation (there is not), K.S.A. 44-523 does not bind the parties to technical rules of procedure. This case should be treated no differently than *Burnett, Magana, McMurtry* and *McDiffett.*

The Board finds it has jurisdiction over both Docket No. 1,034,647 and Docket No. 1,043,900, based upon the appeal filed by respondent and Western.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[18]

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[17] Bankers' Brief at 6 (filed Feb. 28, 2014).

[18] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[19]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[20]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[21]

It is uncontradicted that claimant suffered an accidental injury while working for respondent on June 10, 2005. Medical treatment was provided and the matter went to an Award on July 14, 2008. The dispute herein centers around the claimed accident on September 22, 2008, when claimant experienced pain as she was placing pies in the lower of two ovens. The ALJ determined claimant's permanent impairment stemmed from the earlier, 2005 accident, with the reported incident on September 22, 2008, being only a temporary aggravation. The ALJ went on to find claimant's increased symptoms in her low back and lower extremities are the natural and probable consequence of claimant's 2005 accident.

When claimant was evaluated by Dr. Bieri on August 23, 2007, she was diagnosed by MRI, with stenosis at L4-5 and L5-S1 and lesser findings at L3-4. A CT myelogram was consistent with the MRI findings. However, a nerve conduction study was essentially normal. Claimant had a subjective decrease in sensation along the lateral aspect of the left lower extremity to the toes, and a slight decrease in reflexes on the right. However, when Dr. Bieri examined claimant on February 15, 2010, her symptoms were worse, with

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[19] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[20] K.S.A. 2008 Supp. 44-501(a).

[21] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

increased pain in the low back, and radiating pain into both lower extremities. Claimant displayed increased difficulty with lifting, bending and twisting as well as sitting and driving. Dr. Bieri found a decrease in range of motion of the lower extremities in 2010, and sensory deficits were in both lower extremities, where in 2007, there was only a slight decrease in the left lower extremity. He then assessed claimant an additional 5 percent to the whole person attributable to the most recent injury.

Dr. Pratt did not examine claimant prior to the September 22, 2008, injury, seeing her for the first time on September 10, 2009. But, he did have multiple medical records available for his review. He noted claimant's symptoms since 2005, and classified the 2008 accident as a slight aggravation. Dr. Pratt's history indicated only a slight increase in symptoms following the 2008 accident. He acknowledged claimant had no atrophy in her lower extremities and normal reflexes after the 2005 accident. He also agreed claimant had displayed no right lower extremity complaints from June 10, 2005 through March 5, 2007. He acknowledged claimant failed to discuss lower extremity weakness at the April 10, 2008, hearing. After the September 22, 2008, accident, claimant reported weakness in both the right and left legs. Dr. Pratt's examination noted the existence of atrophy in claimant's left lower extremity, as well as a sensory decrease on the left side. He also testified that the 2008 event resulted in a permanent increase in claimant's symptoms.

Dr. Reintjes did not have the opportunity to examine claimant until February 22, 2012. After examining claimant, he determined she was at maximum medical improvement as of March 23, 2013. He then assessed claimant a 5 percent whole person functional impairment, partially due to the injuries in 2005 and partially to the injuries suffered in 2008.

The ALJ determined claimant's increased symptoms were the natural and probable consequence of the 2005 accidental injury. The Board acknowledges the 2005 accident and resulting injuries caused claimant's condition to become symptomatic and left claimant with a permanent impairment. However, the Board also finds the accident in 2008 likewise contributed to claimant's permanent injuries, impairment and resulting disabilities. Claimant's new impairment and disability are not the natural consequence of the 2005 accident. Instead, they constitute new injuries suffered while claimant worked for respondent with the date of accident being September 22, 2008.

K.S.A. 44-510e Furse 2000 defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained

therein.[22]

The ALJ determined claimant had suffered an increased functional impairment of 5 percent to the whole person. The Board agrees and affirms that finding, although the increased impairment resulted from the September 22, 2008, accident.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[23]

Dr. Bieri determined claimant had a task loss of 29 percent. As noted by the ALJ, Dr. Reintjes found claimant had suffered no task loss, but later modified his opinion, resulting in a loss of 2 of 15 tasks for a 13 percent task loss. Averaging these two opinions results in a task loss of 21 percent. The Award of the ALJ is modified accordingly. The ALJ's determination that claimant has suffered a 64.3 percent wage loss is supported by this record and is affirmed. The average of claimant's task loss and wage loss results in a permanent partial general (work) disability of 42.65 percent. This award is assessed against respondent and its insurance carrier, Bankers Standard Insurance Co., and will be based upon the agreed upon average weekly wage for that date, being $505.76. The work disability award will be effective as of March 1, 2011, the date claimant reduced her work hours to part-time status.

The Award of the ALJ regarding claimant's entitlement to post-award attorney fees, future medical treatment, the unauthorized medical allowance, the 2008 medical visits to Dr. Hodgson, the $1,676 medical bill for the MRI ordered by Dr. Hodgson, claimant's prescription for Tramadol and claimant's visits to Dr. Hodgson for continued Tramadol are affirmed and adopted by the Board so long as those orders do not contradict the findings and conclusions contained herein.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be: reversed with regard to the date of accident to which claimant's current impairment and disability is attributed; modified as to the proper calculation of claimant's task loss, work disability and weekly benefit amount; affirmed with

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[22] K.S.A. 44-510e(a) Furse 2000.

[23] K.S.A. 44-510e Furse 2000.

regard to claimant's wage loss; and affirmed as to the post-award attorney fees, future medical treatment, unauthorized medical allowance, the 2008 medical visits to Dr. Hodgson, the $1,676 medical bill, claimant's past and ongoing prescription for Tramadol, and claimant's future visits to Dr. Hodgson. All other orders contained in the Award, insofar as the Award does not contradict the findings and conclusions contained herein, are affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated December 30, 2013, is reversed in part, modified in part and affirmed in part as above ordered.

REVIEW AND MODIFICATION AWARD

Docket No. 1,034,647

WHEREFORE, AN ADDITIONAL AWARD OF COMPENSATION IS HEREBY REVERSED IN ACCORDANCE WITH THE ABOVE FINDINGS for an accidental injury sustained on June 10, 2005. Per the award on July 14, 2008, claimant has received $10,095.33 (9 percent BAW). Additional award in this matter is denied.

AWARD

Docket No. 1,043,900

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR of claimant, Frances Davenport, and against respondent, MarCon of Kansas, Inc., and its insurance carrier, Bankers Standard Insurance Co., for an accidental injury sustained on September 22, 2008.

Claimant is entitled to a 5 percent whole person functional impairment, based upon an average weekly wage of $505.76, at the weekly rate of $337.19 for 20.75 weeks, totaling $6,996.69, followed by 156.25 weeks of compensation at the rate of $337.19, totaling $52,685.94, for a total award of $59,682.63, based upon a permanent partial general disability of 42.65 percent, all of which is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of May, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

The undersigned disagrees with the majority's decision to review issues related to both dockets, even though no timely appeal was filed in Docket No. 1,043,900. Based upon available judicial interpretations of K.S.A. 44-551(b)(1) and, what I will call the doctrine of implied consolidation, no other result could reasonably occur.

Notwithstanding the majority's expansive review of the judicial application of implied consolidation, the undersigned respectfully disagrees with the majority. There is no provision in the Kansas Workers Compensation Act for the implied consolidation of cases on appeal to the Board. The doctrine of implied consolidation is a purely judicial creation. In *Bergstom*,[24] the Supreme Court stated:

> Where the language of a statute is plain and unambiguous, a court must give effect to its express language rather than determine what the law should or should not be. The court should not speculate on legislative intent and will not read the statute to add something not readily found in it.[25]

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[24] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[25] *Id.* at 607-608, citing *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The Court in *Bergstrom* also wrote, "[w]e have consistently elected to refrain from reading language into the statutes that the legislature did not include."[26]

K.S.A. 2004 Supp. 44-551(b)(1) states, in essence, all final orders and awards of and administrative law judge shall be subject to review by the Board. In this case, the ALJ wrote two separate orders. The orders were contained within the same document but were two separate and identifiably different orders nonetheless. Two separate and distinct injuries giving rise to two separate applications filed pursuant to K.S.A. 44-534, resulting in two separate and distinct orders by the ALJ, create two separate obligations to comply with K.S.A. 2004 Supp. 44-551(b)(1).

In Docket No. 1,043,900, claimant's claim for compensation was denied. That order was not appealed pursuant to K.S.A. 2008 Supp. 44-551(i)(1), and, therefore, claimant relinquished her right to pursue any compensation if, as is the case, the Board modified the two awards issued by the ALJ and placed liability for work disability solely on the insurance carrier in Docket No. 1,043,900. Absent an order or declaration of consolidation by the ALJ, each Order must be treated separately for the purpose of appeal.

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[26] *Id.* at 609. [Citations omitted]